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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 60

MANDALINE E. THOMPSON,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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COMMONWEALTH OF VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered October 12, 1961 (R. 59), in the above-entitled cause.

Opinion Below

None of the Courts below filed a written opinion.

The order of the Supreme Court of Appeals of Virginia dated October 12, 1961 refusing a writ of error, stated that the Court was of the opinion that the judgment of the Corporation Court "is plainly right" (R. 59). The Supreme Court of Appeals recently decided *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S. E. 2d 817 (1961), involving similar issues.

Jurisdiction

The judgment sought to be reviewed is that of the Supreme Court of Appeals of Virginia, entered October 12, 1961 (R. 59; Appendix p. 28, *infra*), refusing a petition for writ of error and supersedeas to review a judgment rendered against petitioner by the Corporation Court of the City of Lynchburg on April 6, 1961 in a prosecution for criminal trespass (R. 55; Appendix p. 25, *infra*). The effect of the denial of the petition for writ of error and supersedeas "is to affirm the judgment of the said Corporation Court" (R. 59).

Chief Justice Eggleston granted a stay to allow petitioner to present a petition for writ of certiorari to this Court provided the case is docketed in this Court by January 10, 1962 (R. 60). The jurisdiction of this Court is invoked pursuant to Title 28 U. S. C. §1257(3), petitioner having asserted below and claiming here a denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether the Court below denied petitioner's rights under the due process and equal protection clauses of The Fourteenth Amendment to the Constitution of the United States to freedom from state supported racial discrimination and freedom of expression, where petitioner has been convicted of the crime of trespass for having remained seated at the lunch counter of a licensed drug store which was opened to the public (including petitioner), but was pursuing a practice of serving food and beverages to Negroes only at a stand-up "take-out" section of the counter while serving white persons at the counter seats

in conformity with a State custom of segregation, and where petitioner was ordered to leave solely on the basis of race and was arrested and convicted in support of the racially discriminatory practice.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The case also involves Section 18.1-173 of the Code of Virginia, 1950 (1960 Replacement Vol.), which provides:

> §18.1-173. Trespass after having been forbidden to do so.—If any persons shall without authority of law go upon or remain upon the lands, *buildings* or premises of another, *or any part, portion or area thereof,* after having been forbidden to do so, *either orally or in writing,* by the owner, lessee, custodian or other person lawfully in charge *thereof,* or after having been forbidden to do so by a sign or signs posted on *such lands, buildings, premises or part, portion or area thereof* at a place or places where *it or* they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one *thousand dollars* or by confinement in jail not exceeding *twelve months,* or by both such fine and imprisonment. (Italics added; the portions italicized were added by a 1960 amendment.)

Statement

Petitioner, a sixteen year old Negro girl (R. 1) has been sentenced to thirty days in jail (R. 52) for having engaged

in a "sit-in" protest. February 13, 1961, petitioner and five other Negroes seated themselves on stools at the lunch counter of a drugstore owned by the Patterson Drug Company, Incorporated in Lynchburg, Virginia (R. 11, 12). The store was open to the public (R. 10), including petitioner. The remaining counter stools were vacant at the time petitioner was in the store (R. 10).

After waiting for service, the group was approached by a vice president and general manager of the corporation who informed them that it reserved the right to serve "whom we chose at our eating facilities" (R. 12), and twice asked them to leave (R. 12).

Petitioner was asked to leave not because of her behavior (R. 19), but solely because the company did not serve Negroes at the counter (R. 20). However, at a stand-up "take-out" section of the counter Negroes are sold this company's food and beverages which then must be eaten off the premises (R. 17). The drugstore is licensed and inspected by the City of Lynchburg (R. 20), and advertises to and invites the general public as customers (R. 14, 21).

When Petitioner, and those with whom she had entered, made no move to leave their seats at the counter (R. 13), the manager summoned a police officer (R. 13), before whom he asked them to leave (R. 13). Police Captain Gilliam informed the group that under Virginia law, one who remained on the premises of another after having been asked to leave was trespassing (R. 9). When they did not leave, he arrested them (R. 9).

Petitioner was charged in the Juvenile and Domestic Relations Court for the City of Lynchburg on February 13, 1961, with remaining upon the lands, buildings and premises of the Patterson Drug Co., Inc. in violation of

Sections 18.1-173 of the Code of Virginia, 1950 (as amended 1960) (R. 1) and convicted on February 23, 1961 (R. 2). She was sentenced to 30 days in jail (R. 2). In a *de novo* trial in the Corporation Court of the City of Lynchburg, a jury was waived, and petitioner was convicted of a violation of the same Code section in that she was "guilty of remaining upon the lands, buildings and premises of another, namely, Patterson Drug Company, Incorporated, after having been forbidden to do so by a person lawfully in charge thereof, as charged . . . " (R. 55), and sentenced to 30 days in jail and to be held in jail until payment of costs, for a period not to exceed fifteen more days (R. 55). The Court declined to follow the Prosecutor's recommendation that sentence be suspended (R. 52).

On May 29, 1961, petitioner filed timely notice of appeal to the Supreme Court of Appeals (R. 57, 58), which writ of error and supersedeas was denied by the Supreme Court of Appeals on October 12, 1961. This denial had the effect of affirming the judgment of conviction rendered by the Court below (R. 59).

How the Federal Questions Were Raised and Decided

The federal questions which petitioner seeks to have this Court review were raised prior to trial in the Corporation Court of the City of Lynchburg by a Plea in Bar filed with the Court (R. 3, 4). In her Plea in Bar, petitioner prayed that the warrant be dismissed and that she be discharged urging that any demand that she leave the premises of the Patterson Drug Company, Incorporated, was made pursuant to a policy, practice and custom of racial segregation, and that a conviction would violate the equal protection and due process clauses of the Fourteenth Amendment (R. 4). The Court heard argument of counsel on the Plea and disallowed it without opinion (R. 5).

Subsequently, at the close of the state's evidence (the defense called no witness) petitioner moved orally to strike the state's evidence and dismiss the proceedings (R. 22 *et seq.*). The following colloquy ensued:

> "Mr. Tucker: Now, if your Honor please, we want to offer a motion, and would like to be heard on a motion to strike the evidence, and to dismiss these proceedings.
>
> The Court: State, briefly, your grounds of the motion, without argument—just let me know the grounds.
>
> Mr. Tucker: The grounds—there are several grounds of the motion.
>
> The Court: Have you them in writing?
>
> Mr. Tucker: Not in that form.
>
> The Court: Go ahead.
>
> Mr. Tucker: Any conviction here would be a violation of the rights of the Defendant to the equal protection of the laws, and to due process of law, as guaranteed by the 14th Amendment to the Constitution. . . . " (R. 22-23).

Continuing (at R. 24), petitioner's counsel referred, in connection with a discussion of "liberty" as protected by the Due Process clause, to the free expression or "protest" issue, stating:

> " . . . So that we see that the abridgement of the present statute, to stifle any protest against equality (sic) in the public market, is a deprivation of liberty, which does not serve a proper governmental objective."

In the lengthy oral elaboration of the motion, and the colloquy with the Court, defense counsel on several occasions reiterated the equal protection argument that the Fourteenth Amendment prohibited the State from thus enforcing racial segregation by use of its criminal trespass laws, and also reiterated the due process objection (see R.

48-49). These contentions were rejected by the Court and the motions were overruled (R. 51).

The "Notice of Appeal and Assignments of Error" properly presented the federal questions raised in the "Plea in Bar" and in the "motion to strike the evidence" (R. 57); this pleading asserted that the Court erred:

1. When it overruled, disallowed and dismissed the plea in bar, the court erred in holding that neither the equal protection clause nor the due process clause of the Fourteenth Amendment to the Constitution of the United States precludes state criminal prosecution of one who merely sat at a lunch counter to purchase and consume food and beverage pursuant to the owner's invitation to the general public and continued to do so notwithstanding the owner's demand that he leave when, as here, it is shown that such demand was made solely because of race and color.

2. When it overruled the motion to strike the evidence and, also, when it entered judgment of conviction, the court erred in holding that neither the equal protection clause nor the due process clause of the Fourteenth Amendment to the Constitution nor Title 42 United States Code, Sections 1981 and 1982, precludes state criminal prosecution of one who merely sat at a lunch counter to purchase and consume food and beverage pursuant to the owner's invitation to the general public and continued to do so notwithstanding the owner's demand that he leave when, as here, it is shown that such demand was made solely because of race and color.

The petition for writ of error and supersedeas to the Supreme Court of Appeals of Virginia again presented the

federal questions for decision. The Supreme Court of Appeals of Virginia disposed of the cause by a judgment or order summarily refusing said writ of error and supersedeas (R. 59). The effect of this refusal was to affirm the judgment of the trial court (R. 59).

Reasons for Granting the Writ

This case involves substantial questions affecting important constitutional rights, and presents for decision issues of great public interest which affect the rights of a large number of litigants in similar cases pending in many different courts.

In recent years this Court has considered several cases which have involved the rights of Negroes to nondiscriminatory use of the dining facilities of various private businesses in differing legal contexts. See e.g. *Boynton* v. *Virginia*, 364 U. S. 454; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Garner* v. *Louisiana*, 30 U. S. Law Wk. 4070 (December 11, 1961). Requests for review have been made in other cases. See for example *Avent* v. *North Carolina*, No. 85, Oct. Term 1961; *Fox* v. *North Carolina*, No. 86, Oct. Term 1961; *Randolph* v. *Virginia*, No. 248, Oct. Term 1961. It is reasonably expectable that further requests will be made in the near future for review of other state court decisions deciding similar issues. The Alabama Supreme Court recently refused to review several "sit-in" trespass convictions. *Gober* v. *City of Birmingham*, Ala. Ct. of Appeals, Oct. Term 1960-61, 6th Div. 797 (May 30, 1961), certiorari denied, Supreme Ct. of Ala., 6th Div. 762, September 14, 1961, rehearing denied November 2, 1961 (with nine other cases decided on same opinion in the Court of Appeals). Similarly the South Carolina Supreme Court recently affirmed trespass convictions in

several sit-in cases. *City of Greenville* v. *Peterson*, Sup. Ct. S. C., No. 4761, decided Nov. 10, 1961; *City of Columbia* v. *Barr*, Sup. Ct. S. C. No. 4777, decided December 14, 1961; *City of Charleston* v. *Mitchell*, Sup. Ct. S. C. No. 4779, decided December 13, 1961. This Court has also had occasion to consider civil litigation touching upon some of the issues in these cases primarily involving travel-connected facilities. *Turner* v. *City of Memphis*, No. 84 Oct. Term 1961; *Bailey* v. *Patterson*, stay injunction denied, 30 U. S. Law Wk. 3201, appeal docketed December 29, 1961, No. 643, Oct. Term 1961.

The constitutional issues are presented in this case in the context of the trespass conviction of a sixteen year old Negro girl for failing upon demand to leave her seat at the lunch counter of a drug store owned by a private corporation in a store licensed by a municipality which invites the general public to enter, but limits food service to Negroes to the purchase of items to be taken off the premises, while serving white persons at the lunch counter stools. The case presents the important issues as to whether the racially discriminatory practices which were enforced against petitioner are prohibited by the Fourteenth Amendment's mandate against state enforced racial discrimination, and that Amendment's protection of free expression. The case necessarily involves the scope and meaning of the Fourteenth Amendment "state action" concept, particularly the impact of community customs and the relevance of various components of nominally "private" conduct, where state executive (police) and judicial action have the effect of enforcing racial discrimination against Negroes by means of the state's criminal laws. The case also involves the use of state power in these circumstances to stifle the right of free expression secured by the Fourteenth Amendment.

A. The Decision Below Conflicts With Prior Decisions of This Court Which Condemn the Use of State Power to Enforce a State Custom of Racial Segregation.

In this case it is clear that the petitioner was refused service, ordered to leave the lunch counter, arrested and convicted of a crime on the basis of her race pursuant to and in the enforcement of a policy of racial discrimination. It is undisputed that the practice of the Patterson Drug Company was to stand ready to serve food at its lunch counter seats to white persons and to refuse such service to all Negroes; that it was the policy to serve Negroes only when they stood at the "take-out" section of the lunch counter; and that petitioner was refused service solely because of her race and for no other reason. It is also apparent that the arrest was made to support this discrimination, and that the trial court convicted petitioner on evidence plainly indicating that race, and race alone, was the reason she was ordered to leave the lunch counter, and consequently arrested and charged upon her failure to leave. This is thus a case where the difference in treatment to which petitioner has been subjected is clearly a racial discrimination.

There are several dominant and relevant components of action by state officials in the chain of events leading to appellant's conviction and punishment for violating the racially discriminatory customs. Here, as in all criminal prosecutions, there is action by state officers in the persons of the police, prosecutors and judges; the official actions of such officers are "state action" within the meaning of the Fourteenth Amendment under clear authorities. The subject of judicial action as "state action" was treated exhaustively in part II of Chief Justice Vinson's opinion in *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18; cf. *Boynton* v. *Virginia*, *supra*. Policemen (*Screws* v. *United States*, 325

U. S. 91; *Monroe* v. *Pape*, 365 U. S. 167) and prosecutors (*Napue* v. *Illinois*, 360 U. S. 264) are equally subject to the restraints of the Fourteenth Amendment.

Ever since the *Civil Rights Cases*, 109 U. S. 3, 17, it has been conventional doctrine that racial discrimination when supported by state authority, violates the Fourteenth Amendment's equal protection clause; and since *Brown* v. *Board of Education*, 347 U. S. 483, it has been settled that racial segregation constitutes a forbidden discrimination.

However, in this case the involvement of the public law enforcement and judicial officers in the racial discrimination practiced against petitioner, through their use of the state's criminal law machinery to support and enforce it, is now sought to be excused because, it is said, there is also "private action" in the picture, and the state is said to be merely enforcing "private property" rights through its criminal trespass laws. It is argued that the state is not really excluding and punishing Negroes, but only "trespassers", and that the state stands ready to punish white trespassers as well. While petitioners are aware of no case of a white person convicted for refusing to leave an all-Negro establishment under a trespass law,[1] there is no reason to doubt that this might occur in communities deeply wedded to the segregation customs. The answer made to a parallel argument in *Shelley* v. *Kraemer*, 334 U. S. 1, 22, is apt—"Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

But the argument that it is only "trespassers" and not Negroes *qua* Negroes who are punished by the State, and thus it is private property rights and not racial discrimination that is being preserved by the state's officers and laws,

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[1] White persons have been convicted for trespass when in company with Negroes in "white only" establishments. *Avent* v. *North Carolina*, *supra*.

requires further analysis. We shall examine in turn, the specific nature of the property right here recognized and enforced by the state, its relation to the state's legitimate interests including protection of the right to privacy, and its relation to state customs and laws.

As a starting point it is fit to observe, as this Court did in *Shelley* v. *Kraemer, supra,* that the mere fact that property rights are involved does not settle the matter. The Court said at 334 U. S. 1, 22:

> "Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U. S. 501, 90 L. ed 265, 66 S. Ct. 276 (1946)."

This Court has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley,* 245 U. S. 60, 74; *United States* v. *Willow River Power Co.,* 324 U. S. 499, 510; *Marsh* v. *Alabama,* 326 U. S. 501, 506; cf. *Munn* v. *Illinois,* 94 U. S. 113. As the Court said in *Marsh, supra,* "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and con-

stitutional rights of those who use it. Cf. Republic Aviation Corp. v. N. L. R. B., 324 U. S. 793, 796, 802."

Because it does matter a great deal what kind of property interest is being created and enforced by the State in given circumstances, we must inquire: What is the nature of the property right of the Patterson Drug Company Inc. which is being enforced by the state in this criminal trespass prosecution?

The Patterson Drug Company Incorporated used the premises involved in its commercial business as a drug store opened to the public generally for the transaction of business including the sale of food and beverages at its lunch counter. This case does not involve enforcement of a general desire to keep everyone, or Negroes, or even this petitioner, from coming upon the premises. The white public was invited to use all the facilities of the drug store, and the Negro public was invited to use all facilities except the lunch counter stools. Negroes were even welcomed to purchase food at the lunch counter provided they stood up to purchase it and left the store to eat. This case does not involve state enforcement of a property owner's desire to exclude a person or persons for reasons of whim or caprice, for as we shall develop below the practice of excluding all Negroes (as a race) from such facilities is in conformity with community custom and a racially segregated "way of life" which has been supported, fostered and buttressed by law. The property interests enforced for the Patterson Drug Company do not involve the integrity of a portion of its premises set aside for non-public use, such as space reserved for the owner or its employees. Nor does the property interest enforced here relate to an owner's claim that a portion of its premises is being sought to be used for a purpose alien to its normal or intended function. Petitioner merely sought

to use a lunch counter stool while consuming food sought to be purchased on the premises, the purpose for which the stools were being maintained. The state is not being called upon here to enforce a property owner's general desire not to sell its goods to Negroes, since food and beverages were offered for sale to Negroes at this counter if they remained standing and took their purchases away with them.

The property interest which *is* being enforced here is a claimed right to open premises to the public generally (including Negroes) for business purposes, including the sale of food and beverages, while racially discriminating against Negroes *qua* Negroes at one of the facilities for the public in the business premises—including a claimed right to have Negroes arrested and criminally punished for failing to obey the owner's direction for them to leave this portion of the store. This claimed property right—the right to racially discriminate against Negroes with respect to being seated in the circumstances indicated—is indeed a type of property interest. The question remains whether the States' laws can give recognition and enforcement to such an interest without violating the Fourteenth Amendment.

Petitioner submits that it is readily apparent that the property interest being enforced against her on behalf of the Drug Company, bears no substantial relation to any constitutionally protected interest of the property owner in privacy in the use of his premises. The State is not in this prosecution engaged in protecting the right to privacy. It has long been agreed by the courts that a state can "take away" this property right to racially segregate in public accommodation facilities without depriving an owner of Fourteenth Amendment rights. *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *Pickett* v. *Kuchan*, 323 Ill. 138, 153 N. E.

667, 49 A. L. R. 499 (1926); *People* v. *King*, 110 N. Y. 418, 18 N. E. 245 (1888); Annotation 49 A. L. R. 505; cf. *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100. And indeed a great number of states in our Nation have enacted laws making it criminal to engage in just the type of racially discriminatory use of private property which the Drug Company seeks state assistance in preserving here.[2] From the fact that the States can make the attempted exercise of such a "right" a crime, it does not follow necessarily and automatically that they must do so, and must refuse (as petitioner here urges) to recognize such a claimed property right to discriminate racially in places of public accommodation. But the fact that the States can constitutionally prohibit such a use of property and that when they do so they are actually conforming to the egalitarian principles of the Fourteenth Amendment (*Railway Mail Ass'n* v. *Corsi*, *supra* at 93-94) makes it evident that the property interest asserted by the Drug Company is very far from an inalienable or "absolute" property right. Indeed the property owner here is attempting to do something that the state itself could not permit him to do on state property leased to him for his business use (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715), or require or authorize him to do by positive legislation (cf. Mr. Justice Stewart's concurring opinion in *Burton*, *supra*).

A basic consideration in this case is that the drug store lunch counter involved is a public establishment in the sense that it is open to serve the public and is a part of the public life of the community. (Mr. Justice Douglas, concurring in *Garner* v. *Louisiana*, 30 U. S. Law Wk.

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[2] See collections of such laws in 2 Emerson and Haber, *Political and Civil Rights in the United States*, 1413 (2d ed. 1958); and Greenberg, *Race Relations and American Law*, Appendix A, para. 6, pp. 375-379 (1959).

4070, 4076, December 11, 1961.) As a consequence of the public use to which the property has been devoted by the owner, this case involves no real claim that the right to privacy is being protected by this use of the State's trespass laws. And, of course, it does not follow from the conclusion that the State cannot enforce the racial bias of the operator of a lunch counter open to the public, that it could not enforce a similar bias by the use of trespass laws against an intruder into a private dwelling or any other property in circumstances where the state was exercising its powers to protect an owner's privacy. This Court has recently reiterated the principle that there is a constitutional "right to privacy" protected by the Due Process clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. ed 2d 1081, 1090, 1103, 1104; see also *Poe* v. *Ullman*, 367 U. S. 497, 6 L. ed 2d 989, 1006, 1022-1026 (dissenting opinions). It is submitted that due consideration of the right to privacy affords a sound and rational basis for determining whether cases which might arise in the future involving varying situations should be decided in the same manner urged by petitioner here—that is, against the claimed property interest. Only a very absolutist view of the property "right" to determine those who may come or stay on one's property on racial grounds—an absolutist rule yielding to no competing considerations—would require that the same principles apply through the whole range of property uses, public connections, dedications, and privacy interests at stake. The Court has recognized the relation between the right of privacy and property interests in the past. See e.g. *Thornhill* v. *Alabama*, 310 U. S. 88, 105-106; *Breard* v. *Alexandria*, 341 U. S. 622, 626, 638, 644.

Petitioner submits that a property right to determine on a racial basis who can stay on one's property cannot be absolute at all, for this claimed right collides at some

points with the Fourteenth Amendment right of persons not to be subjected to racial discrimination at the hand of the government. *Burton* v. *Wilmington Parking Authority, supra; Shelley* v. *Kraemer, supra.* Mr. Justice Holmes said in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355.

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Petitioner certainly does not contend that the principles urged to prevent the use of trespass laws to enforce racial discrimination in a lunch counter operated as a public business would prevent the state from enforcing a similar bias in a private home where the right of privacy has its greatest meaning and strength. A man ought to have the right to order from his home anybody he prefers not to have in it, and ought to have the help of the government in making his order effective. Indeed, the State cannot constitutionally authorize an intrusion into a private home except in the most limited circumstances with appropriate safeguards against abuses. *Mapp* v. *Ohio, supra;* cf. *Frank* v. *Maryland*, 359 U. S. 360. Racial discrimination in a private home, or office, or other property where the right of privacy is paramount is one thing. Racial discrimination at a public lunch counter is quite another thing indeed.

The involvement of the State of Virginia as a whole entity in the present discrimination is so intimate and manifold that the state action standard may be satisfied or bolstered by other criteria than the participation of its

police and courts in enforcing the discriminatory result complained of by petitioner. For racial discrimination has deep roots in Virginia custom and law. "Custom" is specifically included in the opinion in the *Civil Rights Cases* as one of the forms of "state authority" which might be used in efforts to support a denial of Fourteenth Amendment rights (109 U. S. 3, at 17). (See also Mr. Justice Douglas concurring in *Garner* v. *Louisiana*, 30 U. S. Law Week, 4070, 4076.)[3]

The Patterson Drug Company in excluding Negroes from its lunch counter was following a custom of segregating Negroes in public life which is characteristic of Virginia as a community, and which custom has been firmed up and supported by the segregation policies and laws of Virginia as a polity.

Virginia has had a long history of racial segregation laws. Virginia's Constitution of 1902 as amended, Art. IX, §140, required segregation in all schools. In 1915 the state's highest court stated that it was "the declared policy of this state that association of the races tends to breach the peace, unsanitary conditions, discomfort, immorality and disquiet." *Hopkins* v. *City of Richmond*, 117 Va. 692, 86 S. E. 139, 145. The history of "massive resistance" to implementation of this Court's decision in *Brown* v. *Board of Education*, *supra*, is recounted in several opinions, *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959); *N. A. A. C. P.* v. *Patty*, 159 F. Supp. 503, 513-515 (E. D. Va. 1958), vacated on other grounds *sub nom. Harrison* v. *N. A. A. C. P.*, 360 U. S. 167. Virginia's statute books still abound with segregation laws, including laws requiring

[3] As the Court said in *Poe* v. *Ullman*, *supra*, "'Deeply embedded traditional ways of carrying out state policy . . .'—or not carrying it out—'are often tougher and truer law than the dead words of the written text'. Nashville C. & St. L. R. Co. v. Browning, 310 U. S. 362, 369, 84 L. ed. 1254, 1258, 60 S. Ct. 968" (at 6 L. ed. 2d 995).

segregation in places of public entertainment or assembly (Code of Va., 1950, 1960 Replacement Vol., §§18.1-356 and 18.1-357), in prisons (Code of Va., 1950, 1958 Replacement Vol. §53-42); in fraternal organizations (Code of 1950, 1953 Replacement Vol. §38.1-597); in hospitals for the feeble-minded (Code of Va., 1950, 1960 Replacement Vol. §37-183); in air terminals (Code of Va., 1950, 1959 Replacement Vol., §56-326), and prohibiting interracial marriages (Code of Va., 1950, §20-54).

The segregation laws form an edifice created by law—the systematic segregation of Negroes in public life in Virginia. There is good ground for belief that the segregation system, of which the custom enforced by the Patterson Drug Co. is a part, was brought into being or at least given firm contour in its beginning, by State laws. Woodward, *The Strange Career of Jim Crow*, 16-22, 81-85, 91-93.

As Mr. Justice Douglas wrote recently concurring in *Garner* v. *Louisiana*, 30 U. S. Law Wk. 4070, 4077 (Dec. 11, 1961):

> "Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. If these proprietors also choose segregation, their preference does not make the action 'private', rather than 'state' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise. Baldwin v. Morgan, supra; Boman v. Birmingham Transit Co., 280 F. 2d 531."

Finally the property involved in this case is "affected with a public interest," *Munn* v. *Illinois*, 94 U. S. 113. By its use it has become "clothed with a public interest . . . [is] of public consequence, and affect[s] the community at large" (Id. at 126). This property is operated as a lunch counter under a license granted by the City of Lynchburg (R. 20). The licensing by the state demonstrates the public's interest in the business and the governmental recognition of this public character. As Mr. Justice Douglas stated concurring in *Garner* v. *Louisiana*, 30 U. S. Law Wk. at 4078: "A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public."

It is submitted that the totality of circumstances in this case, including the actions of the State's officers in arresting and prosecuting petitioner, the municipal licensing of the property involved and the consequent public character of the business property involved, the plain and invidious racial discrimination involved in the asserted property rights being protected by the state, the absence of any relevant component of privacy to be protected by the state's action in light of the nature of the owner's use of his property, and the state custom of segregation which has created or at least substantially buttressed the type of discriminatory practices involved, are sufficient to require a determination that the petitioner's trespass conviction has abridged her rights under the Fourteenth Amendment.

B. The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

Petitioner, and the other Negroes arrested on the same occasion were engaged in the exercise of free expression

by means of verbal requests to the management of service, and the nonverbal requests for nondiscriminatory lunch counter service which were implicit in their continued remaining at the lunch counter when refused service. The fact that sit-in demonstrations are a form of protest and expression was mentioned in Mr. Justice Harlan's concurrence in *Garner* v. *Louisiana, supra.* Petitioner's expression (asking for service) was entirely appropriate to the time and place at which it occurred. Petitioner, and the other Negroes at the lunch counter did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There were no speeches, picket signs, handbills or other forms of expression in the store which were possibly inappropriate to the time and place. Rather petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States,* 250 U. S. 616, 630, Holmes, *J.*, dissenting), and was within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California,* 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama,* 310 U. S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 633-634 (flag salute); *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (freedom of association).

Petitioner does not urge that there is a Fourteenth Amendment right to free expression on private property in all cases or circumstances without regard to the owner's privacy, and his use and arrangement of his property. This is obviously not the law. In *Breard* v. *Alexandria,* 341 U. S. 622 the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, and upheld a law limiting the publishers' right to solicit on a door-to-door

basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests were involved with a corresponding difference in result.

As was true with the discussion above of the racial discrimination issue, so the free expression issue is not resolved merely by reference to the fact that private property rights are involved. The nature of the property rights asserted and of the state's participation through its officers, its customs, and its creation of the property interest, have all been discussed above in connection with the state action issue as it related to racial discrimination. Similar considerations should aid in resolving the free expression question.

In *Garner* v. *Louisiana*, Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. It is submitted that even absent the owner's consent for petitioner to remain on the premises of this drug store, a determination of her free expression rights requires consideration of the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action is supporting. *Marsh* v. *Alabama*, *supra*.

In *Marsh*, *supra*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize for their faith, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama*,

supra, involving picketing on company-owned property; see also *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N. L. R. B.*, 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357, and compare the cases mentioned above with *N. L. R. B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional riglits of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by this trespass prosecution, is support of the property owner's discrimination in conformity to the State's segregation custom and policy. This is all that the property owner has sought.

Where free expression rights are involved, the questions for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 52. The only "substantive evil" sought to be prevented by this trespass prosecution is the elimination of racial discrimination and the stifling of protest against it; but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. There is no claim that the state's authority is being exerted here to protect the public peace. There is no claim

that petitioner or those associated with her were in any way disorderly or that they threatened to breach the peace, nor any indication that it was threatened by anyone else. But even if others had threatened the peace, by a threat to attack petitioner for example, the state's officers "are supposed to be on the side of the Constitution, not on the side of discrimination" (Mr. Justice Douglas, concurring in *Garner* v. *Louisiana*, *supra*); see *Buchanan* v. *Warley*, 245 U. S. 60; *Cooper* v. *Aaron*, 358 U. S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Cir. 1947), Cert. Den. 332 U. S. 851; *Terminiello* v. *Chicago*, 337 U. S. 1.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Judgment of Trial Court

Virginia: At Lynchburg Corporation Court, April 6, 1961.

Commonwealth

vs. Misdemeanor. Trespassing.

Mandaline E. Thompson, Accused.

This day, the day on which this case was set for trial, came the Commonwealth's attorney, and the said Mandaline E. Thompson appeared in court in her own proper person according to the condition of her recognizance, and the said accused also appeared by her attorney, and the accused in her own proper person pleaded not guilty to the charge of remaining upon the lands, building and premises of another, namely, Patterson Drug Company, Incorporated, after having been forbidden to do so by a person lawfully in charge thereof, and with the consent of the accused in person and by her attorney, and the concurrence of the Commonwealth's attorney, and of the court, a jury was waived, and the whole matter of law and of fact was submitted to the court and the evidence being heard, the accused by her attorney moved the court to strike the commonwealth's evidence upon the ground that it is not sufficient to support a conviction of the accused, which motion the court overruled, and the accused by her attorney excepted, and thereupon the court having heard the evidence and argument of counsel, the court doth find the said accused, Mandaline E. Thompson, guilty of remaining upon the lands, buildings and premises of another, namely, Patterson Drug Company, Incorporated, after hav-

ing been forbidden to do so by a person lawfully in charge thereof, as charged, and doth ascertain and fix her punishment at confinement in jail for thirty days. It is therefore considered by the court that the said Mandaline E. Thompson be and she is hereby committed to jail for said term of thirty days, to be computed from the date of this judgment, no time having been spent by said accused in jail awaiting trial, and that she pay the costs of this prosecution, and it is ordered that said accused, who has been present in her own proper person at all time throughout the trial of this case, be further held in jail until payment of said costs, provided that said last mentioned term in jail shall not exceed fifteen days. At the instance of the accused by her attorney who intimated her intention to apply for a writ of error and supersedeas, the court doth order that execution of the foregoing judgment be suspended until the 5th day of June, 1961 and the said accused is allowed bail. Thereupon the said Mandaline E. Thompson, together with Henry Q. Thompson and Bessie E. Thompson, her sureties, who justified as to their sufficiency, was duly recognized in the sum of $500.00, upon condition that if the said Mandaline E. Thompson shall make her personal appearance before the corporation court for the city of Lynchburg, at the courtroom thereof, on the 5th day of June, 1961, at 9:30 o'clock A.M., to answer the said charge of trespassing and the foregoing judgment thereon, and shall make her personal appearance at any time or times to which this case may be continued or further heard, before any court, judge or justice having or holding any proceeding in connection therewith, to answer for said offense of trespassing and to answer the said judgment thereon as aforesaid, and shall not depart thence

without leave of court, judge or justice, then said rec
nizance to be void, otherwise to remain in full force a
effect.

A Copy, Teste:

/s/ HUBERT H. MARTIN, Clerk

L.O.B. 42 p. 478

Filed:

Apr. 6, 1961
H. Hm., Clk.

Judgment Below

VIRGINIA

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of October, 1961.

The petition of Mandaline E. Thompson for a writ of error and supersedeas to a judgment rendered by the Corporation Court for the City of Lynchburg on the 6th day of April, 1961, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

A Copy, Teste:

/s/ H. G. Turner, Clerk

Office Supreme Court, U.S.
FILED
MAR 31 196
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 196

No. [redacted]

MANDALINE E. THOMPSON,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT Y. BUTTON
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Richmond 19, Virginia

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IN THE

Supreme Court of the United States

October Term, 1961

No. 655

MANDALINE E. THOMPSON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

"In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as 'an irresponsible body' and 'independent of the nation itself'. The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. * * *

"Our right to pass on the validity or legislation is now too

much a part of our constitutional system to be brought into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court, should be indifferent to public temper and popular wishes. * * * A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution."

FRANKFURTER, J. concurring
American Fed. of Labor v.
American Sash & Door Co.,
335 U.S. 538, 555-557

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated March 1, 1962, the Attorney General of Virginia was requested to file a response to the petition for writ of certiorari in the instant case.* In accordance with the request contained in the above mentioned communication, written by the Clerk at the direc-

* Post, Appendix A.

tion of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

PRIOR PROCEEDINGS

On February 23, 1961, petitioner was convicted in the Juvenile and Domestic Relations Court of the City of Lynchburg for violation of Section 18.1-173 of the Code of Virginia (1950), as amended. She was sentenced to jail for a period of thirty days. Upon appeal to the Corporation Court of the City of Lynchburg, petitioner was again convicted and a similar sentence was imposed on April 6, 1961. A petition for writ of error to the judgment of the Corporation Court was denied by the Supreme Court of Appeals of Virginia on October 12, 1961, and the cause is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by the petitioner on January 10, 1962.

STATEMENT OF FACTS

On February 13, 1961, petitioner and five other members of the Negro race entered the premises of the Patterson Drug Store in Lynchburg, Virginia, and attempted to obtain service therein at eating facilities reserved for white patrons. (R. 2,6,11-12). Because of their race, all members of this group were refused service at these facilities and were asked to leave the premises. (R. 3,6-7,14). This request was made by the Vice-President and General Manager of the Patterson Drug Co., Inc., the private corporation which owns and operates the Patterson Drug Store, after that official had introduced himself to the members of the group and explained his position with the company. (R. 3,5-7). Petitioner refused to leave the premises, although she was advised by a police officer who had been summoned

to the scene that she would be arrested if she did not do so. (R. 3,7-8). When petitioner persisted in her refusal, she was arrested for trespassing in violation of Section 18.1-173 of the Virginia Code. (R. 3,8).

THE STATUTE

Under attack in the instant case is Section 18.1-173 of the Code of Virginia (1950) as amended, which provides:

> "If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.
>
> "This section shall not be construed to affect in any way the provisions of §§29-165 to 29-170."

QUESTION PRESENTED

Does Section 18.1-173 of the Virginia Code, as applied to petitioner in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

Section 18.1-173 of the Virginia Code, as Applied to Appellant in the Case at Bar, Does Not Contravene the Fourteenth Amendment to the Constitution of the United States.

Section 18.1-173 of the Virginia Code first appeared as Chapter 165 of the Acts of the General Assembly of 1934.

Acts of Assembly (1934), Chapter 165, p. 248. With minor amendments, the language of the instant statute is substantially identical to that contained in the original enactment. As is manifest from its terms, the statute does no more than impose criminal sanctions for continued trespass by an individual upon the lands or premises of another after proper warning and is entirely devoid of any racial connotation whatever. ***The statute does not purport to be, and is not, a racial segregation law.*** It forbids trespass by anyone—whether he be a member of a racial minority or not—in going upon or remaining upon the private property of another when he is not welcome.

That the enactment in question is not a racial segregation law and has no racial connotation is conclusively established by the decision of this Court in *Hall* v. *Commonwealth*, 188 Va. 72, 49 S. E. (2d) 369, *app. dism.* 335 U. S. 875, *reh. den.* 335 U. S. 912. In that case the Court held that the statute, as applied to a member of the sect of Jehovah's Witnesses who refused to leave the premises of a private building after proper warning, was not violative of the right to freedom of speech, press, assembly or worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Sections 12 and 16 of the Constitution of Virginia. Commenting upon the effect of the statute, the Court observed (188 Va. at 76-77):

> "The language of the statute is clear and unambiguous. Its provisions may be invoked only when a person has unlawfully entered or has remained upon the premises after he has been forbidden so to do by one lawfully in charge or in possession. . . . The only purpose of this law is to protect the rights of the owners or those in lawful control of private property.
>
> * * *

> "We find nothing in the statute when properly applied which infringes upon any privilege or right guaranteed to the accused by the Federal Constitution."

Equally manifest is it that invocation of the statute under the circumstances of the case at bar impairs no constitutional right of the petitioner. The record undeniably demonstrates that the petitioner was not arrested because of her race or color, but solely because she refused to leave the premises of a privately owned and operated drug store when requested to leave and persisted in remaining upon such premises after having been forbidden to do so.

Under such circumstances, resort by a private individual or corporation to the protection of a statute imposing criminal sanctions for continued trespass upon private property after proper warning presents no question whatever of conflict with the Fourteenth Amendment. Within the past five years the argument advanced by petitioner in the case at bar has been urged in various jurisdictions and uniformly rejected. See: *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. (2d) 295; *Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 268 F. (2d) 845; *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124, *aff'd. per curiam* 4 Cir., 284 F. (2d) 746; *Griffin* v. *Collins*, 187 F. Supp. 149; *State* v. *Avent*, 253 N.C. 580, 118 S.E. (2d) 47; *Drews* v. *Maryland*, 224 Md. 186, 167 A (2d) 341; *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S.E. (2d) 817; *Griffin* v. *Maryland*, 225 Md. 442, 171 A (2d) 717; *Henderson* v. *Trailway Bus Co.*, 194 F. Supp. 423. Observations of the various judicial tribunals in certain of these cases are sufficiently significant to merit reproduction in the body of this brief.

In *State* v. *Clyburn, supra*, the Supreme Court of North Carolina—in a situation identical to that under consideration in the case at bar—sustained the conviction of a Negro who

had been charged with unlawfully entering upon the lands of another after having been forbidden to do so and unlawfully refusing to leave that portion of the premises reserved for members of the opposite race. In that case, the defendant and other Negroes had entered the business premises of certain proprietors who were engaged in retailing ice cream and sandwiches and who operated their facility on a racially segregated basis.

Pointing out that North Carolina law imposed criminal penalties for interfering with the possession or right of possession of real estate privately held, that the possessor might accept or refuse whomsoever he pleased and for whatever whim suited his fancy and that race conferred no prerogative upon the intruder nor impaired his defense, the Supreme Court of North Carolina declared (101 S.E.(2d) at 299):

> ". . . the Supreme Court of the United States said in Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 842, 92 L.Ed. 1161, 3 A.L.R. 2d 441: 'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*' This interpretation has not been modified: Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253; District of Columbia v. Thompson Co., 346 U.S. 100, 73 S. Ct. 1007, 97 L.Ed. 1480; Williams v. Yellow Cab Co., 3 Cir. 200 F. 2d 302, certiorari denied; Dargan v. Yellow Cab Co., 346 U.S. 840, 74 S. Ct. 52, 98 L.Ed. 361.
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> *"The right of an operator of a private enterprise to select the clientele he will serve and to make such selec-*

tion based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. Madden v. Queens County Jockey Club, 269 N.Y. 249, 72 N.E. 2d 697, 1 A.L.R. 2d 1160; Terrell Wells Swimming Pool v. Rodriguez Tex. Civ. App., 182 S.E. 2d 824; Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589, 24 L.R.A., N.S., 447; Younger v. Judah, 111 Mo. 303, 19 S.W. 1109; Goff v. Savage, 122 Wash. 194, 210 P.374; De La Ysla v. Publix Theatres Corporation, 82 Utah 598, 26 P. 2d 818; Brown v. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P. 2d 651; Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N.E. 2d 574; Coleman v. Middlestaff, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; Fletcher v. Coney Island, 100 Ohio App. 259, 136 N.E. 2d 344; Alpaugh v. Wolverton, 184 Va. 943, 36 S.E. 2d 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." (Italics supplied.)

In *Williams* v. *Howard Johnson's Restaurant, supra,* a Negro who had been denied service in a Howard Johnson's Restaurant located in Alexandria, Virginia, because of his race instituted suit for a declaratory judgment and injunctive relief, contending that his exclusion from the restaurant in question upon racial grounds violated rights secured to him by the Constitution and laws of the United States. Sustaining the dismissal of petitioner's complaint by the United States District Court for the Eastern District of Virginia as being "in accord with the decisions of the Supreme Court of the United States and other Federal courts", Judge Soper—speaking for the United States Court of Appeals for the Fourth Circuit—observed (268 F. (2d), at 847):

"The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restau-

rants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the States from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the State which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasises the long established local custom of excluding Negroes from public restaurants and he contends that the acquiesence of the State in these practices amounts to discriminatory State action which falls within the condemnation of the Constitution. The essence of the argument is that the State licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

"This argument fails to observe the important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices. Unless these actions are performed in ovedience to some positive provision of State law they do not furnish a basis for the pending complaint.

* * *

"The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelley* v. *Kraemer*, 334 U. S. 1; 68 S. Ct. 836, 842, 92 L. Ed. 1161:

"'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3; 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the*

> *States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'" (Italics supplied.)

Griffin v. *Collins, supra,* involved a class action for injunctive relief to prevent the arrest for trespass of Negroes who might visit the Glen Echo Amusement Park in Montgomery County, Maryland, in opposition to the all-white policy of its owner and operator. Plaintiffs were Negroes who had been arrested, or threatened with arrest, for trespass upon the premises of the privately owned and operated amusement park. They sought an adjudication declaring that the acts of the owner and operator of the amusement park "in utilizing governmental authority and powers of the State and the sanctions of State law to aid, support and enforce the denial to plaintiffs, solely because of their race, of admission to Glen Echo Park and enjoyment of its facilities" violated plaintiff's rights under the Constitution of the United States. *Griffin* v. *Collins, supra* at 152.

Holding that the arrest of Negro trespassers by police officers of the State of Maryland—in response to the request of an amusement park proprietor for police assistance in enforcing such proprietor's policy of excluding Negroes—did not constitute State action in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, the Court observed (187 F. Supp. at 153-154):

> "The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 1947, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161. Cf. Dawson v. Mayor & City Council of Baltimore, 4 Cir., 1955, 220 F. 2d 386, affirmed 350 U. S. 877, 76 S. Ct. 133, 100 L. Ed. 774

"Plaintiffs concede the right of the corporate defendants, as owners and operators of Glen Echo Park, to serve or refuse to serve whomever they please, and concede that said defendants, like other property owners or operators of a private business, may use 'self-help' to eject a Negro who insists on remaining on the premises after being told to leave. Counsel argue, however, *that if the proprietor of a business calls a police officer,* deputy sheriff, or other state official to remove or arrest the Negro, such action or arrest would (1) violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which forbid state-imposed racial discrimination in the field of recreational activity and (2) deprive the Negro of his rights under 42 U.S.C.A. §§ 1981 and 1983.

"Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights." (Italics supplied.)

In *Henderson* v. *Trailway Bus Company, supra,* plaintiffs sought to enjoin the enforcement of Section 18.1-173 of the Virginia Code (the very enactment challenged in the instant case) upon the ground that the statute, as applied to "sit-in" demonstrations, was violative of the Fourteenth Amendment to the Constitution of the United States. Rejecting this contention and dismissing the complaint, the three-judge District Court (Boreman, Circuit

Judge, and Lewis and Bryan, District Judges) observed (194 F. Supp. at 426):

> "But, in any event, the critical factor is that the statutes apply only to places where a person goes 'without authority of law', meaning property not at the time affected with a public interest. *Racial segregation on property in private demesne has never in law been condemnable. Indeed, the occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use. Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 1959, 268 F. 2d 845; *Slack* v. *Atlantic White Tower System*, 4 Cir., 1960, 284 F. 2d 746. *Assurance of this right is the entire and sole aim of the two code provisions before us. Hall* v. *Commonwealth, supra*, 188 Va. 72, 49 S. E. 2d 369, 371. In there sustaining the statute the Virginia Court relied in part upon *Martin* v. *City of Struthers*, 319 U.S. 141, 147, 63 S. Ct. 862, 865, 87 L. Ed. 1313, where Justice Black said:
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> > 'Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. * * *' "
> > (Italics supplied.)

So far as counsel for the Commonwealth are aware, there has been no decision—State or Federal—at variance with the views expressed in the above mentioned cases. In light of these decisions, the Commonwealth submits that the constitutional validity of the Virginia statute under attack in the case at bar has been so thoroughly well settled by such a unanimity of judicial opinion that no really serious assertion of antagonism to the Fourteenth Amendment can be

made. In this connection, certain fundamental similarities shared by these decisions are immediately apparent. Initially, it should be noted that each of these cases was decided the same way, and each decision was rendered by a unanimous court. *Not one dissenting judicial voice is heard.* Obviously, none of the tribunals in question experienced any difficulty in ascertaining the applicable law governing the case before it, and none hesitated to declare the rights of the parties in accordance with that law. Moreover, in each of these cases, decisions of the Supreme Court of the United States were relied upon to establish the central constitutional principle involved, i.e., that the Fourteenth Amendment to the Constitution of the United States has nothing whatever to do with the racially selective practices of private individuals and does not prohibit invocation of State enforced trespass statutes to protect individuals exercising their right to discriminate. Of particular significance is the fact that the individual court considering each of these cases stressed the decision of the United States Supreme Court in *Shelley* v. *Kraemer,* 334 U. S. 1, as supportive of its disposition of the case before it in a manner diametrically opposed to the contention of appellant in the case at bar.

Clearly this Court has settled beyond question for more than three-quarters of a century that the action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the States, that the Fourteenth Amendment erects no shield against merely private conduct and that actions carried out by the people of a State in accordance with their own desires or social practices do not constitute actions of the State. *Civil Rights Cases,* 109 U. S. 3; *Shelley* v. *Kraemer, supra.* Counsel for the Commonwealth respectfully submit, therefore, that the case at bar does not even present a judicial—much less a substantial federal —question.

CONCLUSION

For the foregoing reasons counsel for the Commonwealth submit that Section 18.1-173 of the Virginia Code, as applied to the petitioner in the case at bar, presents no question whatever of conflict with the Fourteenth Amendment to the Constitution of the United States and that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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Supreme Court–State Library Building
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APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

March 1, 1962

THE HONORABLE ROBERT Y. BUTTON
Attorney General of Virginia
Richmond, Virginia

RE: THOMPSON v. VIRGINIA
No. 655, October Term, 1961

Dear Sir:

A petition for writ of certiorari was filed in the above-entitled case on January 10, 1962.

I have been directed by the Court to request that you file a response to such petition. Your response should be printed and 40 copies, with service, should reach this office on or before March 31, 1962.

Very truly yours,

JOHN F. DAVIS, *Clerk*

By E. P. CULLINAN *S/*

E. P. CULLINAN
Chief Deputy

EPC: jmh